IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.122 OF 2006

IN

DRAFT NOTICE OF MOTION NO. OF 2005

IN

L.C.SUIT NO.4705 OF 2005

ALONG WITH

CIVIL APPLICATION NO.150 OF 2006

M/s.Condequip Engineers & Consultants
& Anr. ..Appellants

Versus

The Municipal Corporation of
Gr.Mumbai & Anr. ...Respondents

.....

Mr.B.G.Vaidya for Appellants.

Mrs.Joglekar for Respondent No.1.

Mr.S.M.Sakhardande with Mr.S.N.Nair for
Respondent No.2.

.....

CORAM: A.M.KHANWILKAR, J.

FEBRUARY 20, 2006.

P.C.

1. Heard Counsel for the parties. Perused

the relevant materials on record.

2. Admit. Mrs.Joglekar waives notice for Respondent No.1. Mr.Sakhardande waives notice for Respondent No.2.

3. This Appeal from Order takes exception to the order passed by the City Civil Court, Greater Mumbai dated November 21, 2005 in draft Notice of Motion No.122 of 2006 in L.C.Suit No.4705 of 2005. The Respondent No.2 filed Suit for permanent injunction against the Appellants essentially in respect of Shop Nos.8 and 9 in the building owned by the Respondent No.2 Society on Plot No. 65, Malad Ganga Co-operative Housing Society Ltd., Relief Road, Mith Chowki, Malad (West), Mumbai - 400 064 on the assertion that the Appellants have commenced business in the said shops without the permission of the Respondent No.2 Society. The Trial Court has allowed the said Notice of Motion in the following terms.

> "The defendant Nos.2 and 3 are temporarily restrained from carrying business of Fast

> Food/Eating House/Restaurant at Shop Nos.8 and 9, Plot No.65, Malad Ganga Co-operative Housing Society Limited, Relief Road, Mith Chowki, Malad (West), Mumbai - 400 064.
>
> Rest of the prayers in Notice of Motion stands rejected.
>
> At this stage, Mr.Vergeese prays for staying of the operation of the order for four weeks. Mr.Malgaonkar objects on the ground that, this order is itself preventive order and if it is stayed, then it would amount to allowing the defendants to carry out the business without license. In my view, the orders do not deserve to be stayed for the reason that, the defendant would continue their business for which admittedly, they do not possess any license under section 394 of BMC Act. Prayer stands rejected.
>
> C.C. Expedited."

4. The basis on which Trial Court has proceeded to dispose of the Notice of Motion on the above terms can be discerned from the reason mentioned in Para 9 of the impugned Judgment. It is stated that admittedly, no license under Section 394 of the Bombay Municipal Corporation Act is issued by the B.M.C. and Defendants cannot run business without license and if at all they were doing so, the same would be, in the absence of any license, an illegal activity.

5. Before this Court, the grievance made on behalf of the Appellants is that the Trial Court has not bothered to even advert to the several documents placed on record on behalf of the Appellants, amongst others, the license is issued by the Authorities regarding permission to conduct eating house. That fact was stated on affidavit before the Court below supported by the relevant documents. There is substance in the above grievance made on behalf of the Appellants. Since the basis on which the Trial Court has proceeded to decide the motion is erroneous, the ultimate conclusion will have to be set-aside.

6. To get over this position, Counsel for the Respondent No.2 contends that perhaps the Trial Court took the view that the documents on which reliance is placed by the Appellants, do not pertain to Shop Nos.8 and 9. It is not the reason stated by the Trial Court. It is not possible for this Court to assume that the fact noted by the Trial Court that no license has been granted to the Defendants by the Corporation is on the assumption

that the license which is referred to by the Appellants in the affidavit of Mrs.Hazel Grower was not pertaining to Shop Nos.8 and 9.

7. In the circumstances, the only course open for this Court is either to reappreciate the materials on record itself to record finding of fact relevant to the point in issue or in the alternative, relegate the parties before the Trial Court to decide the Notice of Motion afresh on its own merits, after considering all the relevant materials on record.

8. I would adopt the latter course, because the Trial Court will have to advert to all the relevant documents which are pressed into service by both the parties to record a clear finding of fact on the point in issue which arises in the Notice of Motion.

9. In the circumstances, the impugned Judgment and order is set-aside and instead, the Notice of Motion is restored to the file to its original number before the Trial Court to be heard

and decided expeditiously and preferably within two weeks from the receipt of writ of this Court or from the date of production of the copy of this order by either party bringing to the notice of the Trial Court the direction to decide the Notice of Motion within two weeks from such date.

10. It is made clear that all questions are left open. The Motion will be decided afresh on its own merits in accordance with law.

11. Till the Motion is decided, the parties are directed to maintain status-quo as of today with regard to the suit property. Ordinarily, since the Appellants have succeeded before this Court, the temporary injunction order passed by the Trial Court will have to be set-aside; it would be unfair to direct the Appellants not to continue with the business activities in Shop Nos.8 and 9. However, the direction of maintaining status-quo as of today is issued on the basis of the observations noted in the Commissioner’s report dated 16th November 2005 which states that the Shop Nos.8 and

9 were found to be under repairs at the relevant time.

12. With a view to obviate any conflicting stands to be taken by the parties, direction is issued to the parties to maintain status-quo as of now with regard to the suit properties till the Motion is decided, which is directed to be finally disposed of within two weeks as mentioned earlier.

13. Appeal and the cognate Civil Application disposed of on the above terms.

A.M.KHANWILKAR, J.